THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Pis-25-160

STATE OF MAINE
Appellee

v.

WILLIAM BRADBURY
Appellant

ON APPEAL from the Piscataquis County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Introduction.....**4**

Argument.....**5**

First Assignment of Error

I. There was insufficient evidence to sustain a conviction on Count II. . 5

Second Assignment of Error

II. The discovery violation necessitates exclusion. 9

Conclusion..... **11**

Certificate of Service & Filing..... **12**

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Kyles v. Whitley, 514 U.S. 419 (1995) 10

Cases

State v. Fagone, 462 A.2d 493 (Me. 1983) 11

State v. Idris, 2025 ME 17, 331 A.3d 419 5

State v. Lowden, 2014 ME 29, 87 A.3d 694 6

State v. Reed-Hansen, 2019 ME 58, 207 A.3d 191 ..... 9, 10

Statutes

17-A M.R.S. § 253(2)(D) (2024) 5

17-A M.R.S. § 260(1)(A) 6

17-A M.R.S. § 260(1)(B) (2022) 6

Rules

M.R. U. Crim. P. 16(a)(1) 9

M.R. U. Crim. P. 18(b) 10

INTRODUCTION

I. The State's legal premise – being "half asleep" communicates a lack of acquiescence – is counter to the statutory scheme. If it were adopted, sexual partners will be subjected to convictions and prison-terms for touching their lovers' bodies in the middle of the night in hopes of initiating sex.

II. The State's insistence that it did not commit a discovery violation is exactly why this Court should vacate. The discovery violation was patent, and a meaningful remedy is needed to instruct the State about its discovery obligations and the penalties for its noncompliance. Otherwise, Maine courts can expect more late discovery, more continuances, more appeals about discovery, and further erosion of public faith in our courts' and prosecutors' adherence to rules and laws.

ARGUMENT

First Assignment of Error

I. There was insufficient evidence to sustain a conviction on Count II.

"Unconsciousness is a physical cue that communicates non-acquiescence," goes the State's legal argument. Red Br. 6. There are numerous problems with such a construction.

To begin, support for the State's assertion is not found in the lone case it cites. *State v. Idris*, 2025 ME 17, 331 A.3d 419 is about a statute that specifically prohibits the commission of a sexual act when "[t]he other person is **unconscious** or otherwise physically incapable of resisting and has not consented to the sexual act." *Idris*, 2025 ME 17, ¶ 7, citing 17-A M.R.S. § 253(2)(D) (2024) (emphasis added). Given that statute, the *Idris* Court recognized that a "lack of consent" could be communicated either verbally or simply by being "unconscious." *Id.* ¶ 10. Naturally enough, because the Legislature plainly enumerated "unconsciousness" as an element, proof of such is sufficient under that statute to prove that the lack of consent has been communicated. However, there are several problems with applying this holding, specific to § 253(2)(D), to unlawful sexual touching of the sort alleged in our case.

First, the Legislature has *already* enacted a separate unlawful-sexual-touching statute that applies when the "other person" is "unconscious." 17-

A M.R.S. § 260(1)(B) (2022)[1] ("The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual touching."). The State's reading of the provision applicable in our case, § 260(1)(A), would render § 260(1)(B) a redundancy – surplusage. *Cf. State v. Lowden*, 2014 ME 29, ¶¶ 18-19, 87 A.3d 694 (rules of statutory construction do not permit making language redundant). If the State's reading were correct, this Court would have to reason that the Legislature bothered to enact a superfluous provision. That is an absurd reading of the statutory scheme, taken as a whole.

Notice, also, what else the "unconscious" statutes – § 260(1)(B) and that at issue in *Idris* – require for proof. To establish a violation there, the State must prove both that a victim is "unconscious" *and* that the victim "has not consented to the" sexual conduct. Yet, the State asserts that unconsciousness *alone* is sufficient to prove a lack of consent or acquiescence. Had the Legislature intended that to be so, they would not have bothered to specify *both* unconsciousness *and* the lack of consent. The fact that it bothered to specify both indicates that it did not intend mere unconsciousness to establish a lack of acquiescence. Lack of acquiescence is something more than just unconsciousness.

Across Maine, spouses, lovers and those merely "hooking up" not infrequently touch their mates' "breasts, buttocks, groin or inner thigh, directly or through clothing, for the purpose of arousing … sexual desire,"

[1] Though § 260 has otherwise been amended, *see* P.L. 2023, c. 280 § 5 (effective Oct. 25, 2023), Subsection (1), Paragraph (B) remains unchanged.

while the other is asleep. "Morning sex" and "wake-up sex" are enjoyed by many. The State would have this Court hold that, in each of these cases, Mainers have committed crimes permitting up to 364 days in prison.[2]

Even were defendant's legal analysis completely wrong, the facts anyway don't carry the State's burden. Sister 2 testified that when defendant "**started** touching me," "that's when I woke up." A34; SX 2 (emphasis added). Once she was awake, she observed, in her words, "him touching me inappropriately." *Id*. While she was awake, defendant "kept touching" her, and, though she kept her eyes shut for a while, she felt "wetness" on her breast. A28; SX 2. There is no evidence that any sexual touching occurred while Sister 2 was "unconscious." The "inappropriate" touching occurred once she was awake.

The foregoing relates to whether the State proved beyond a reasonable doubt that Sister 2 did not acquiesce. Even if there is sufficient such proof, the State also needed to prove that defendant was grossly deviant in failing to recognize a lack of acquiescence.

Here, we have a teenager choosing to spend time with a male who routinely displayed his genitals to her, both in person and by video, sometimes masturbating to the point of ejaculation. He repeatedly told her that he wanted to engage in oral sex with her. The girl and her sister repeatedly chose to visit his home. On one occasion, the male kissed the girl's

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[2] Surely a spouse or prior sexual partner has not consented to every possible subsequent sexual act/contact/touching simply by being in a relationship or previously engaging in like conduct.

sister's breasts, which the girl witnessed. Yet, they returned to his home. On one return visit, the girl chose to lie down and fall asleep on the couch, and her family left her behind, alone with the male. She did not object when she discovered defendant touching her breast and masturbating himself. Where is the gross deviation?

Second Assignment of Error

II. The discovery violation necessitates exclusion.

The lead law enforcement officer in District Five has filed a brief that represents that the State committed no discovery violation. *See* Red Br. 9 ("The State Complied with Maine Rule of Criminal Procedure 16."); *id*. at 11 (contending there was no "true discovery violation[]"); *id*. at 13 ("The State met its discovery obligations…."). Respectfully, reversal is apparently needed "to educate the State" about its discovery duties. *Cf*. *State v*. *Reed-Hansen*, 2019 ME 58, ¶ 19, 207 A.3d 191.

The State contends that "it was the police who caused the late disclosure." Red Br. 9. It asserts, "the prosecution did not possess the late evidence during the period of delay." Red Br. 12. This betrays a rather startling, fundamental misunderstanding of discovery obligations, both rule-based and constitutional. The prosecutor is imputed with "possession and control" of whatever the police possess and control:

> The obligation of the attorney for the State extends to matters within the possession or control of any member of the attorney for the State's staff and of any official or employee of this State or any political subdivision thereof who regularly reports or who, with reference to a particular case, has reported to the office of the attorney for the State.

M.R. U. Crim. P. 16(a)(1). Mirroring Rule 16(a)(1) is the prosecutor's constitutional duty to obtain discoverable materials from "others acting on the government's behalf in the case, including the police." *Kyles v*. *Whitley*,

514 U.S. 419, 437 (1995).[3] Via its extra-record footnotes, the State has confirmed what was anyway crystal clear: the officers who possessed the extracted files for nearly eight months before the State produced them in discovery were certainly reporting to the prosecution in this case. *See* Red Br. 4, 10 n. 1 & 4.

The State's failure harms the entire system. By the time of the belated production, the parties and judiciary had endured a dispositional conference (at which the parties were obligated to "be prepared to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution," M.R. U. Crim. P. 18(b)); two docket calls; and the court had specially set the matter for trial. *See* A5-A6. This process was effectively nullified by the State's failure to do what Rule 16 requires. More of the same squandering of resources and undermining of defendants' procedural rights is bound to occur, given the State's "persistent and inexplicable failure to recognize" its duties and its resultant "slipshod practice." *Reed-Hansen*, 2019 ME 58, ¶ 11.[4]

And defendant was personally prejudiced. Handed "several printed photos" on the second day of trial, Red Br. 4, he had no ability to investigate the metadata that might have established that the video was not on his phone

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[3] One shudders to think of how many due-process – *i.e.*, "*Brady*" – violations the prosecution's faulty conception of its discovery obligations has resulted in during the past roughly four decades.

[4] Even had the State previously been unaware that police officers' possession and control is imputed to prosecutors, that point was made at pages 22-23 of the Blue Brief.

when the incidents allegedly occurred. He had no opportunity to accept a plea deal informed by knowledge of the evidence against him; to choose a bench trial (one might prefer that only one fact-finder, rather than fourteen of them, view you masturbating); or to cross-examine the girls in hopes of demonstrating that the images were incompatible with what they claimed defendant had shown them. Defendant was driven from the stand,[5] spoiling his planned trial strategy. *Cf. State v. Fagone*, 462 A.2d 493, 496 (Me. 1983) ("[A]ny practice that effectively deters a material witness from testifying is invalid unless necessary to accomplish a legitimate interest.").

As it is, the State suffered no penalty for its rule-breaking. It *chose* not to offer the images in its case-in-chief. It waited until the moment defendant had to decide whether to testify to show its cards and yield the fruits of its non-compliance. No penalty was paid, so it should be no surprise that the State clearly has not learned any lesson or even recognized its duties.

CONCLUSION

For the foregoing reasons and those in the Blue Brief, this Court should vacate defendant's convictions and remand for entry of judgment of acquittal on Count II and a further proceedings on the remaining counts.

Respectfully submitted,

November 6, 2025

/s/ Rory A. McNamara

Rory A. McNamara, #5609

[5] The State says this is "speculative." Red Br. 12. However, the record clearly bears defendant out on this point. *Compare* A21; 2Tr. 4 *with* 2Tr. 11.

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CERTIFICATE OF SERVICE & FILING

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara